

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

FILED

ROSSLYN JEAN CARRIER,

Plaintiff-Appellee,

Vs.

GENE ALLEN CARRIER,

Defendant-Appellant,

FROM THE MADISON COUNTY
CHANCERY COURT, No. 48297
THE HONORABLE JOE C. MORRIS,
CHANCELLOR
C.A. No. 02A01-9608-CH-00180
AFFIRMED AND REMANDED

James F. Butler; Spragins, Barnett,
Cobb & Butler of Jackson
Cecil Crowson, Jr.
Appellate Court Clerk

Joe H. Byrd, Jr., of Jackson
For Appellant

MEMORANDUM OPINION¹

CRAWFORD, J.

This is a divorce case. Defendant, Gene Allen Carrier (Husband), appeals the order of the trial court dividing the marital property and awarding alimony to the plaintiff, Rosslyn Jean Carrier (Wife).²

The parties were married on July 17, 1967. They have two children together, but both children have reached the age of majority. At the time of trial, Husband was forty-eight years of age, and Wife was forty-four. Husband had an associate's degree from a junior college at the time of the marriage, but completed a bachelor's degree during the marriage. Husband has been employed with the Maytag Corporation for more than twenty years and earns an annual salary of approximately \$75,000 plus a \$10,000 bonus. Wife has an associate's degree that she received during the marriage. Wife is employed with the Jackson Area Chamber of Commerce and earns an annual salary of \$21,500.

On September 16, 1993, Wife filed a complaint for divorce on the grounds of irreconcilable differences and inappropriate marital conduct. On November 3, 1994, Wife

¹Rule 10 (Court of Appeals). Memorandum Opinion. -- (b) The Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in a subsequent unrelated case.

² The granting of the divorce is not an issue raised on appeal.

amended her complaint to allege that Husband was guilty of adultery. The complaint prayed for, *inter alia*, an absolute divorce, an equitable division of the marital property, alimony, and attorney's fees. On September 11, 1995, Husband filed an answer admitting irreconcilable differences and that he was guilty of inappropriate marital conduct and adultery.

The case was tried before the chancery court, sitting without a jury, on September 11, 1995. The trial court granted an absolute divorce to Wife based on Husband's adultery. The trial court also divided the marital property and awarded Wife \$171,600.00 in alimony for a period of sixteen years on a declining basis, which we conclude from the decree as a whole to be alimony *in solido*.

Husband appeals from the order of the trial court and basically presents two issues for review: 1) whether the trial court erred in the amount of its award of alimony to Wife; and 2) whether the trial court erred in its division of the marital property.

Since this case was tried by the court sitting without a jury, we review the case *de novo* upon the record with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings, we must affirm, absent error of law. T.R.A.P. 13(d).

In the first issue, Husband argues that the trial court erred with respect to the alimony award because the amount awarded is not supported by Wife's needs. Husband points out that Wife's expenses would be reduced if she moved into a smaller house. In addition, Husband asserts that Wife's expenses for clothing are counted twice because they appear in her payments of department store credit cards and in her monthly expenses. Husband further argues that the alimony award is punitive.

The factors used to determine the proper amount of maintenance and support are found in T.C.A. § 36-5-101(d) (1996). As a general matter, the courts set the amount of a support award based on the needs of the innocent spouse and on the ability of the obligor spouse to pay. *Batson v. Batson*, 769 S.W.2d 849, 861 (Tenn. App. 1988). If one spouse is economically disadvantaged compared to the other, the courts are generally inclined to provide some type of support. *Id.*

The record in this case indicates that Wife's expenses total \$3,660 per month. Although Husband contends that Wife's clothing expenses are counted twice, the payments on the

department store credit cards reflect past purchases for clothing and shoes whereas the other expenses reflect Wife's need to make such purchases in the future. The record further indicates that Husband makes almost four times as much income as Wife. We believe that Husband has the ability to pay the award. In addition, the trial court specifically stated in its final decree of divorce, "The alimony award is not based so much on the fault of Mr. Carrier, but more on his ability to pay and Mrs. Carrier's proven needs." The record reflects that the trial court considered the factors set out in T.C.A. § 36-5-101 (d) (1), and the evidence does not preponderate against the findings of the trial court. This issue is without merit.

The next issue for review is whether the trial court erred in its division of the marital property.

Trial courts have broad discretion in dividing the marital estate upon divorce. *Kincaid v. Kincaid*, 912 S.W.2d 140, 142 (Tenn. App. 1995). In *Batson v. Batson*, 769 S.W.2d 849 (Tenn. App. 1988), this Court discussed the equitable division of marital property:

Tenn.Code Ann. § 36-4-121(a) provides that marital property should be divided equitably without regard to fault. It gives a trial court wide discretion in adjusting and adjudicating the parties' rights and interests in all jointly owned property. *Fisher v. Fisher*, 648 S.W.2d 244, 246 (Tenn.1983). Accordingly, a trial court's division of the marital estate is entitled to great weight on appeal, *Edwards v. Edwards*, 501 S.W.2d 283, 288 (Tenn.Ct.App. 1973), and should be presumed to be proper unless the evidence preponderates otherwise. *Lancaster v. Lancaster*, 671 S.W.2d 501, 502 (Tenn.Ct.App. 1984); *Hardin v. Hardin*, 689 S.W.2d 152, 154 (Tenn.Ct.App.1983).

A trial court's division of marital property is to be guided by the factors contained in Tenn.Code Ann. § 36-4-121(c). However, an equitable property division is not necessarily an equal one. It is not achieved by a mechanical application of the statutory factors, but rather by considering and weighing the most relevant factors in light of the unique facts of the case.

Batson, 769 S.W.2d at 859.

As stated by this Court in *Wallace v. Wallace*, 733 S.W.2d 102 (Tenn. App. 1987):

The value of marital property is a fact question. Thus, a trial court's decision with regard to the value of a marital asset will be given great weight on appeal.

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The value of a marital asset is determined by considering all relevant evidence regarding value.

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... [T]he trial court, in its discretion, is free to place a value on a marital asset that is within the range of the evidence submitted.

Id. at 107 (citations omitted).

Husband contends that the trial court did not place values on the parties’ household furnishings and that the trial court erred in the values it placed on some of the other marital property. Husband asserts that his sworn affidavit, filed with the court clerk before trial pursuant to the local rules but not offered into evidence at trial, contains the correct values of the marital property. Husband points out that Wife did not file a sworn affidavit pursuant to the local rules and that there was no other evidence before the trial court as to these values.

Although Husband’s affidavit is not evidence, *Turner v. Turner*, 776 S.W.2d 88, 90 (Tenn. App. 1988), we will give Husband the benefit of that proof establishing the value of the household furniture at approximately \$23,500.00. The equity in the marital home was \$40,695.00, and Wife was awarded Husband’s one-half interest therein as alimony *in solido*. However, it appears that the trial court intended for the division of marital property to include the home equity and then intended to award Husband’s one-half interest to Wife as additional alimony *in solido*. With this in mind, we conclude that the marital property was divided as follows:

Wife		Husband	
20,347.50	home equity	20,347.50	home equity
2,599	1992 Toyota	43,244	401(k)
2,528	½ Maytag stock	3,950	1994 Toyota
7,977	½ Metlife policy	2,528	½ Maytag stock
2,394	½ stock options	7,977	½ Metlife policy
4,400	savings bonds	2,394	½ stock options
21,980	household furnishings ³	500	1968 Volkswagen
		1,550	household furnishings/miscellaneous. ⁴
		1,300	Soloflex
		1,300	IRA
62,225.50	total	85,090.50	total

This division results in approximately 42 percent of the marital estate to Wife and 58 percent of the marital estate to Husband.⁵ In order to equalize and in an attempt to make a more

³ The values given to the household furnishings are based on Husband’s sworn affidavit. (T.R. 20.)

⁴ These values are also based on Husband’s affidavit. (T.R. 20.)

⁵ This total does not include the division of the retirement plan, which was divided equally between the parties pursuant to a Qualified Domestic Relations Order. Because the trial

equitable distribution of marital property, the trial court awarded Husband's one-half interest in the home equity in the amount of \$20,347.50 to Wife as alimony *in solido*. Considering the additional alimony *in solido*, the net result is that Wife receives approximately 56 percent of the total marital estate and Husband receives approximately 44 percent of the total marital estate.

From our review of the record and giving Husband the benefit of his proffered evidence, we find that the evidence does not preponderate against the trial court's findings as to the division of property and the award of one-half of the home equity as alimony *in solido*.

Finally, Wife contends that Husband should be required to pay her attorney's fees and costs of appeal for the necessity of defending this action. Under the circumstances of this case, we conclude that Wife's request for attorney's fees on appeal should be granted.

The decree of the trial court is affirmed. The case is remanded to the trial court for such further proceedings as may be necessary, including a determination of the amount of attorney's fees to be awarded Wife for this appeal. Costs of appeal are assessed against appellant for which execution may issue, if necessary.

**W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.**

CONCUR:

ALAN E. HIGHERS, JUDGE

**HEWITT P. TOMLIN, JR.
SENIOR JUDGE**

court divided the retirement plan equally, however, the amounts are not necessary for our determination.